84-203

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO.

KENNETH W. BEHREND and
BEHREND, ARONSON and MORROW

Petitioners,

v.

ALTON GODWIN and KAREN GODWIN,
and VICTOR SCHRAMM, UNITED
STATES OF AMERICA.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 2, 1984

6758

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit committed fundamental reversible error by sustaining the District Court 's approval of an indefinite structured settlement which was not within the grant of jurisdiction to the District Court under the Federal Tort Claims Act (28 U.S.C.A. Sec. 1346, 1346(b), 2671 et seq., 2679(b)?

2. Whether the Third Circuit erred in sustaining the District Court's disallowance of petitioner's claim for attorneys' fees and litigation preparation expenses without an evidentiary hearing?

INDEX AND TABLE OF CASES

Questions Presented.....	-i-
Table of Contents.....	-ii-
Citations.....	-iii-
Introductory Prayer.....	1
Citations to Opinions Below.....	2
Statement of Jurisdiction.....	2
Statutes.....	3-4
Statement of the Case.....	5-15
Argument for Allowance of the Writ.....	16-26
Conclusion.....	27
Appendix.....	1(a)
Opinion of Third Circuit Court of Appeals.....	1(a)-22(a)
The Third Circuit Court of Appeals final order denying Petition for Reconsideration - May 4, 1984.....	23(a)
District Court Order of December 15, 1982.....	24(a)
District Court Order of January 18, 1983.....	25(a)-26(a)
Certificate of Service.....	27(a)-28(a)

TABLE OF CITATIONS

	Page
Alyeska Pipeline Service Co. vs. Wilderness Society; 421 U.S. 240, 955 S. Ct. 1612, 44 L. Ed. 2d 141.....	16
Barbara Blum et al vs. Ellen Stenson, etc.;____ U.S. ____, 104 S. Ct. 1541, ____ L. Ed. 2d ____ (1984).....	16
Fitzpatrick vs. IRS; 665 F. Supp. 327, 332 (11th Cir. 1982)	26
Frankel vs. Heym et al; 466 F2d 1226 (3th Cir. 1982).....	19,20,21 22,23,24
Hensley vs. Eckerhart; ____ U.S. ____, 103 S. Ct. 1983, 76 L. Ed. 2d 40 (1983).....	16
Lindy Brother Builders, Inc. vs. American Radiation and Standard Sanitary Corporation; 487 F2d 161 (3d Cir. 1973), on remand 381 F. Supp. 999 (E.D. Pa. 1974) vacated, 540 F2d 102.....	26
Mansfield C.& L. M. Ry Company vs. Swan et al.; 111 U.S. 379 (1884)	24
Rozak vs. United States; 658 F2d 471 (7th Cir. 1981).....	23
Silverman vs. Bogle; 683 F.2d 62 (3d. Cir. 1982).....	25
United States et al vs. Corrick et al.; 298 U.S. 435, 56 S. Ct. 289 (1936).....	24

STATUTES:

	Page
28 U.S.C. 171	17
28 U.S.C. 2671	17
28 U.S.C. 2678	17,19, 22,23
28 U.S.C. 2679	21
28 U.S.C. 1346	21

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PETITION FOR WRIT OF
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STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners, Kenneth W. Behrend and Behrend, Aronson and Morrow pray that a writ of certiorari issue to review the final judgment order of the United States Court of Appeals for the Third Circuit entered in these proceedings on May 4, 1984.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit dated March 30, 1984 is reported at 731 F.2d 153 (3rd Cir. 1984) and reproduced in the Appendix to this Petition. The opinion of the District Court is not officially reported. The orders appealed from are included in the appendix.

JURISDICTION

Jurisdiction in the U.S. District Court was based on 28 U.S.C. Sec. 1346 (a)(b); 2671, 2672, 2677 and 2678.

The Court of Appeals for the Third Circuit after argument entered its opinion and order on March 30, 1984 and on May 4, 1984 denied the petition for reconsideration.

Jurisdiction in the Supreme Court of the United States is invoked by this petition pursuant to 28 U.S.C. Sec. 1254 (1)(2).

STATUTORY PROVISIONS INVOLVED

United States Code - Title 28

Section 1346 United States as Defendant

"...(b) Subject to the provisions of chapter 171 of this title, the district courts, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government...

Section 2672 Administrative Adjustment of Claims

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred..."

Section 2677 Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commmencement of an action thereon.

(As amended July 18, 1966, Pub.L. 89-506, Sec. 3, 80 Stat. 307.)

Section 2678 Attorney Fees; Penalty

No attorney shall charge, demand, receive, or collect for services dered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2667 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(As amended July 18, 1966, Pub.L. 89-506, Sec. 4, 80 Stat. 307.)

STATEMENT OF THE CASE

The present appeal is before this Honorable Court from a final order of the U.S. Court of Appeals for the Third Circuit which sustained the District Court's disallowance of petitioner's claims for attorney fees on the future benefit aspect of a structured settlement which terminated the substantive legal action filed pursuant to the Federal Tort Claims Act. Petitioner has also appealed from the order which extinguished his claim for litigation preparation expenses and record costs under 28 U.S.C. Sec. 2412.

The essential facts of the controversy are as follows: The substantive action was a medical malpractice claim filed by Alton and Karen Godwin, hereinafter referred to as Godwin or plaintiff-respondent, against the United States

(herein referred to as defendant-respondent) for serious permanent injuries that resulted from an operation undertaken by Alton Godwin in a Veterans Administration related hospital. During the surgery which was performed to remove growths from Godwin's vocal cords, a laser beam ignited oxygen being administered through a tube in Godwin's throat. The extensive damage caused to his entire bronchial tract and totally impaired left lung requires frequent surgical procedures to sustain his respiratory system. The supportive surgery must be undertaken for the rest of his life. At the time of the injury, Godwin, a military service veteran was disabled from an industrial injury. Godwin engaged Kenneth W. Behrend and Behrend, Aronson and Morrow (hereinafter referred to as petitioner) to represent him in his claim against the parties

responsible for the injury. The initial action was filed in a Pennsylvania State court against the supplier of an appliance used in the operation and named as defendants the operating physicians. During the process of pretrial discovery the United States was substituted as a defendant and the case was removed to U.S. District Court on May 27, 1981 with federal jurisdiction invoked under the Federal Tort Claims Act. With several additional defendants added and extensive discovery being required the case assumed protracted proportions and constant follow-up control. Petitioner diligently managed the law suit during the twenty months consumed by the extensive discovery.

In September 1982, when the third party actions were severed for separate trial, and the primary action of Godwin v. the

United States was poised for trial, the parties intensified their settlement negotiations. In November 1982 after a range of settlement proposals were weighed, a structured settlement plan was offered by the government providing for a cash payment of $1,125,000, and for the first time, a provision for lifetime medical care and treatment for plaintiff-respondent under the Veteran's Administration hospital system. The proffered lifetime medical care aspect was not defined in specific monetary terms in the agreement. Despite petitioner's insistence that the indefiniteness of the proposal rendered its enforcement essentially impossible and did not assure Godwin the unfettered right to pursue civilian medicine, no effort was made by the government to correct the deficiency. (In addition, the District Court did not

demarcate with a precise finding the upper limit of monetary damages included in the judgment order under 28 U.S.C. 1346(b).

When petitioner advised against acceptance of the structured proposal in its indefinite terms and anticipated commencement of a trial on the merits of the case, plaintiff-respondent Karen Godwin telephoned the trial judge for advice. Encouraged by representations made by the court during the call, plaintiffs-respondents informed petitioner they would accept the structured agreement.

It does not appear from the record of the unusual colloquial status conference proceedings conducted in the case, that the district judge advised the plaintiffs-respondents that his ruling on the fee application of petitioner was subject

to appeal and that enforcement of the future medical care provision could involve interpretation in a legal proceeding with the need for future legal representation. The District Court in approving the structured agreement, denied petitioner's application to define the value of the future aspect of the proposal and his claim for a 25% fee against the fund so designated. The court held, further, that the future benefits accrued to plaintiff-respondent as a matter of right had not been generated by petitioner's considerable efforts in the protracted case. The Court warned petitioner that any effort by petitioner to realize a fee on the future benefit aspect was violative of the criminal sanction proviso of the Federal Tort Claims Act (28 U.S.C. Sec. 2678).

In response to petitioner's inquiry concerning litigation preparation expenses and record costs, the Court entered an order directing petitioner to file a statement of said costs for presentation for payment by the United States. At the conference, noticed as a hearing to review the expenses and costs, the Court disbursed in separate checks to Godwin and petitioner the $1,125,000 cash settlement fund, and took petitioner's expenses and costs statement under advisement without hearing testimony on the validity of the expenses which exceeded $62,000. The reasonableness of the amount of expense was not challenged by the U.S. Attorney or the Court; but the government denied liability for these items. In an unreported memorandum opinion delivered less than a week later, the Court denied the expense application of petitioner in

full on the grounds that: (1) petitioner did not have a valid contract for reimbursement of the expenses and (2) petitioner's application for fees on the future benefit aspect of the settlement had violated the Code of Professional Responsibility (Pa. Disciplinary Rule 2-106) which provides in effect that counsel in a contingent fee case is proscribed from charging an excessive fee.

The record below does not reflect that the eight step criteria set forth in part B of the Rule 2-106 to define what is excessive in contingent fees had been followed by the District Court in making that determination.

Petitioner appealed from the fee disallowance and the denial of the trial preparation expenses to the U.S. Court of Appeals for the Third Circuit. The Circuit Court sustained the District Court

on the separate and distinct grounds that: (1) petitioner's negotiating tactics had given rise to an estoppel that foreclosed his claim against the future benefit fund, and (2) the release provisions of the settlement agreement foreclosed his claim against the United States for said expenses. The Circuit Court further concluded that petitioner's claim against the Godwin's, if he intended to assert one, was not provided for in a legally sufficient contract; which in effect tortured petitioner's change order reducing the contingent fee from 40% to 25% into a rescission of the original contract of representation.

Petitioner's Motion for Reconsideration was summarily refused by the Third Circuit giving rise to this appeal. Petitioner asserts that although the due process

implications of the District Court's handling of the issues below should stand review by this Honorable Court, a more important substantive matter has been challenged by the orders herein of the District Court and erroneously approved by the Court of Appeals for the Third Circuit. Petitioner submits that when the U.S. Attorney offered an indefinite future benefit to the plaintiff-respondent not defined as "money damages" it was acting beyond the limited scope of its authority as established by Congress in enacting the Federal Tort Claims Act. In addition, when the District Court approved the settlement agreement it likewise assumed a power beyond the grant of jurisdiction to the district courts in 28 U.S.C. Sec. 1346(b) and 28 U.S.C. Sec. 2671 et seq. Petitioner further asserts that the Court of Appeals for the Third Circuit by

failing to apply its own established rule of law on the issue has made an erroneous choice of law amounting to fundamental error, which is subject to correction by this Honorable Court in the exercise of its plenary power.

REASONS FOR GRANTING THE WRIT

In this complex case, the jurisdiction of this Honorable Court is invoked to review a decision of the United States Court of Appeals for the Third Circuit in the dynamically expanding area of attorney fee jurisprudence in the federal court system. Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975); Barbara Blum, et al. v. Ellen Stenson, etc; ____ U.S. ____, 104 S. Ct. 1541, ____; ____ L.Ed2d ____ (1984); Hensley v. Eckerhart, ____ U.S. ____, 103 S. Ct. 1983, 76 L.Ed2 40 (1983). The precise issue raised by the facts of this case is before this Honorable Court as a problem of first impression which has , enroute to this forum left the controlling rule of law in the Third Circuit confused

and indefinite of application and in possible conflict with the prevailing rule in the U.S. Court of Appeals for the Seventh Circuit.

The issue presented for the consideration of this Honorable Court is two fold: (1) a determination of the legal essence of the structured future medical benefit aspect of the settlement agreed to between respondent-plaintiff and respondent defendant pursuant to the Federal Tort Claims Act 28 U.S.C. Sec. 2671, 2678; and (2) the application of Sec. 2678 of the same act in establishing the attorney fees and suit preparation expenses for counsel who had litigated the matter to the apparent agreed final settlement. As noted above, the settlement res was comprised of a cash fund of $1,125,000 and provision for lifetime medical care and treatment of the

respondent-plaintiff at the Veterans Administration Hospital.

It should be noted in this regard that despite the several status and settlement conferences that where held prior to and in furtherance of eventually striking the final settlement agreement, no definite effort was made by the respondent, United States of America to circumscribe in precise figures of currency the exact obligation accruing against the Veterans Administration by the agreement for future medical care. The relevant provision covering a wide spectrum of medical services makes no reference to the precise amount of any necessary future medical expense nor the frequency with which any of such services may have to be performed.

In addition, the District Court did not attempt to determine a "money damage" amount for the future fund despite the ready availability of the depositions and evidentiary materials from which the crucial determination could have been made. Petitioner had steadfastly insisted that his client was not properly protected by the agreement and insisted on the right to be heard in determining money value of the present worth of the future medical expenses and the validity of his claim for the statutory fee of 25% under 28 U.S.C. Sec. 2678.

Your petitioner respectfully submits that the procedure invoked and the settlement mechanism offered in the instant case by the U.S. Attorney and approved by the District Court had been discontenanced by the U.S. Court of Appeals for the Third Circuit in Frankel

v. Heym et al., 466 F.2d 1226 (3rd. Cir. 1972) wherein in the United States in a Federal Tort Claims case had asked the District Court to cast an award for the plaintiff's permanent personal injuries in the form of a reversionary trust. The device suggested in Frankel included a provision for indefinite future payments and interim progress payment of attorney fees as the trust funds were paid out to plaintiff. In affirming the District Court's rejection of the structured trust as a settlement vehicle the reviewing Circuit Court directed as follows:

> "Admittedly, courts of law had no power at common law to enter judgment in terms other than a simple award of money damages. In view of that limitation, we have examined the enactment, 28 U.S.C. Sec. 171, that authorized and circumscribed tort actions against the sovereign and, to some extent,

prescribed the procedure for such cases. More particularly, Section 2679(b) of Title 28, makes the remedy provided in Section 1346 of Title 28 the exclusive resort of such claimants as the plaintiffs. Among other things, Section 1346(b) authorizes district courts to entertain "civil actions on claims against the United States, for money damages..." Arguably, this language at least implies that primary awards in such civil suits must take the form of common law money judgments, the only form of "money damages" known to the common law. More probably, the Congress never considered whether it might be desirable that some awards be made in a different form.

We agree with the district court that in administering the legislation in question a district court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award. The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them.

The district court also alluded to the continuing burden of judicial supervision that would attend a judgment creating a life trust. This too is a consideration against the government's proposal.

It is clear and distinct that a sharp conflict prevails in the Third Circuit on the issue of the legal validity of open end, structured settlements of undefined future benefits. The Third Circuit's prior refusal to recognize the extension of district court jurisdiction over novel type of awards other than those for money damages in Federal Tort Claims litigation was not addressed nor specifically overruled by this same appellate tribunal in the proceedings below. And inasmuch as Frankel negates jurisdiction in this crucial area of the law, the instant settlement agreement is not only indefinite of performance but remains vulnerable to modification or rescission by either of the parties thereto. The anxiety which the opinion writer below expressed over the failure of Congress to provide guidelines on the application of

28 U.S.C. Sec. 2678 attorney fee control is concern that underpins the entire scope of application of the Federal Tort Claims Act. Petitioner submits that in the face of the instant confusion the government attorneys in their ongoing negotiations of current and future tort claims must tread cautiously in managing serious permanent injury claims and are severely restricted in the use of a viable negotiating measure in addressing the potential catastrophic claims which threaten the national presence and economy, e.g. the Three Mile Island nuclear accident and the Agent Orange disaster. In this regard it is noteworthy that the Court of Appeals for the Seventh Circuit in Rozak v. United States 658 F.2d 471 (7th Cir. 1981) has bolstered Frankel in its refusal to intrude in the attorney-client relationship by a structuring of attorney fees.

It is your petitioner's contention here that although the direct force of Frankel was not addressed to nor considered by the Courts below that the issue at bar was preserved for this Court's review by petitioner's insistence on the right to establish by an evidentiary presentation the present value of the element of the structured agreement which had not been defined in prior proceedings in the matter. Further, inasmuch as the instant appeal directly questions the grant of power by Congress to the district courts and the essence of their jurisdiction under the Federal Tort Claims Act the instant case should survive a challenge that the issue was foreclosed by the litigation below. United States et al v. Corrick et al, 298 U.S. 435, 56 S. Ct. 829 (1936); Mansfield C. & L. M. Ry Co. v. Swan et al, 111 U.S. 379 (1884).

Your petitioner respectfully prays that this Honorable Court issue writ of certiorari and accept for review the final judgment order of the Circuit Court below. the said Circuit Court upon remand should return the matter to the District Court to conduct such proceedings as may be necessary to cure the uncertainty and instability that clouds the instant agreement and that has left unsettled and confused the jurisdiction of the district courts under the Federal Tort Claims Act. Petitioner submits respectfully that the facts of the unusual procedure followed by the District Court below accentuates the proposition that an evidentiary hearing is required whenever there is a dispute on a question of material fact in attorney fee applications. See e.g. Silverman v. Bogle, 683 F.2d 62, 64 (3rd Cir. 1982):

Fitzpatrick v. IRS 665 F. Supp. 327, 332 (11th Cir. 1982): Lindy Bros. Builders, Inc. v. American Radiation and Standard Sanitary Corp., 487 F.2d 161, 169 (3rd Cir. 1973), on remand, 381 F. Supp. 999 (E.D. Pa 1974) vacated, 540 F.2d 102 (3rd Cir. 1976).

With the matter before it again under remand instructions, the district court would then have the opportunity to define with certainty the plaintiff-respondent's claim for future benefits against the United States. The same process could be utilized to test the validity of petitioner's claim against the fund as re-constructed, and will allow a reasonable opportunity for review for the first time, the extensive litigation expense and record costs.

CONCLUSION

In light of the foregoing reasons, your petitioner prays that a writ of certiorari should issue to the Court of Appeals for the Third Circuit for review of the judgment order of May 4, 1984.

Respectfully submitted,

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August 2, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5065, 83-5129, 83-5130

ALTON GODWIN and KAREN GODWIN, his wife

v.

VICTOR SCHRAMM,
UNITED STATES OF AMERICA

Kenneth W. Behrend,

Appellant

Appeal from the United States
District Court for the Western District
of Pennsylvania (Pittsburgh)

(D. C. Civil No. 81-0856)

Argued December 1, 1983

BEFORE: GIBBONS, SLOVITER, *Circuit Judges*,
and GREEN, *District Judge*•

(Opinion filed March 30, 1984)

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• Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

At issue is the 25 percent statutory limit on attorney's fees in federal tort claims. The plaintiffs below, Alton and Karen Godwin, settled their medical malpractice claim against the United States for a cash payment of $1,125,000 and provision for lifetime medical care by the Veterans Administration (VA).

Kenneth Behrend, the lawyer who represented the Godwins, appeals from the district court's orders limiting his contingent fee to 25 percent of the cash award and excluding the future medical benefits from the base upon which the fee may be calculated. We affirm.

I.

FACTS AND PROCEDURAL HISTORY

Kenneth Behrend and the law firm of Behrend, Aronson & Morrow (jointly referred to as Behrend) were retained by the Godwins following a referral after Godwin suffered injuries while undergoing surgery by Veterans Administration physicians. During the surgery, which was performed to remove growths from Godwin's vocal cords, a laser beam ignited oxygen being administered through a tube in Godwin's throat. Godwin's entire bronchial tract was severely damaged; his left lung is totally impaired, and because scar tissue obstructs his airway Godwin must breathe through a tracheostomy and undergo frequent operations to dilate the airway. He can speak only with the aid of an electronic box. Godwin was 34 years old at the time of the surgery, was a veteran, was disabled from a job related injury, and was married with two young children.

Behrend filed an administrative claim with the Veterans Administration on August 11, 1980 alleging liability of Dr. Victor Schramm, supervising surgeon for the VA. On November 18, 1980, Godwin executed a power of attorney to Behrend that provided for a contingent fee of 40 percent in connection with the prosecution of his "claim against Brunswick and others" for the injuries. App. at 37a. In April 1981, Behrend filed a Pennsylvania state court suit against Brunswick Corporation, the seller of the endotracheal

tube used in the operation. That suit was dismissed after some discovery. Behrend also filed suit in state court against Dr. Michael Duvall, the resident who performed the operation, and Dr. Schramm. In May 1981, pursuant to 38 U.S.C. 4116 (1976), the United States removed the case to the United States District Court for the Western District of Pennsylvania, substituted itself as the defendant, and later brought some third party defendants into the case.

In August 1981 Behrend sent the Godwins a letter informing them that their fee "will be limited to 25 percent of the total gross recovery." Behrend did not inform the Godwins that because the case was now a federal tort claim action, it came under 28 U.S.C. § 2678 which limits attorney's fees to 25 percent of a judgment or settlement. Instead, the letter Behrend sent stated, "We have taken this action [25% fee] after reviewing your case and coming to the conclusion that your damages are, indeed, more substantial than was understood at the time the Power of Attorney was signed." App. at 38a. There was no written acceptance by the Godwins, and there is no record of assent by them.

The matter proceeded and ultimately a settlement was negotiated for a cash payment of $1,125,000 and provision for lifetime medical care and treatment at the Veterans Administration Hospital.[1] Behrend counseled the Godwins to reject this proposal and to proceed to trial. He also prepared a settlement sheet which he presented to the Godwins in November 1982. This

---

1. Paragraph 3 of the settlement agreement provides:

> 3. That the Veterans Administration and its successors or assigns shall continue to provide full and complete medical care and treatment to Alton Godwin for the rest of his life in accordance with the applicable Veterans Administration statutes, regulations and directives governing delivery of

document, signed by the Godwins, authorized Behrend to approve the settlement and to make distribution in the manner set forth. The settlement sheet calculated the amount "to be received in settlement" as $2,091,000.[2] This sum, which is $966,000 over the cash payment, is based upon Behrend's calculation of the present value of future medical care to Godwin at $4,830,000. Since 80% of Godwin's medical costs would have been paid by the Medicare program, Behrend included 20 percent of the estimated value of that care as part of the settlement proceeds. The

---

health care services by the Veterans Administration. This includes, but is not limited to, full medical treatment, restorative treatment, maintenance treatment, emergency treatment, psychiatric treatment, hospital care, nursing home care, domiciliary care and all other medical care and services in accordance with the applicable Veterans Administration statutes, regulations and directives. In no event shall the quality of medical care and treatment that has been provided to Alton Godwin to date be diminished or compromised.

Alton Godwin shall be eligible for medical care and treatment as if the injuries he sustained on March 25, 1980, were service connected for the purposes of 38 U.S.C. §§ 610, 612, 614, 618 and 619.

App. at 59a.

2. The explanation in the Settlement Sheet is as follows:

This figure $2,091,000 is computed as follows: cash-$1,125,000 plus 20% of the average value of the medical care to be provided, determined to be $3,220,000 to $6,440,000, which averages $4,830,000. 20% is used as it is assumed, maybe improperly, that federal benefits would have been 80% of this. To the extent that any of the 80% medical benefits would not be provided, counsel waives the right to claim a fee on such higher value of benefits to be provided. 20% of $4,830,000 is $968,000.

App. at 57a.

estimated value of medical care was based on a life expectancy 75 percent of normal, although there was no conclusive estimate of Godwin's life expectancy and predictions ranged from three or five years to normal. Behrend then added the $966,000 to the cash award to arrive at a figure for settlement proceeds of $2,091,000, and listed his fee as $522,750, or 25 percent of the total. The document provided that Behrend would be paid $350,000 upon settlement and the remainder in six annual installments of $28,791.66. The document also provided for payment upon settlement of approximately $60,000 in expenses, and stated that the signatures of the Godwins were "with the intention of being legally bound."

While Behrend was still urging the Godwins to go to trial, Mrs. Godwin telephoned the district judge. As the judge later stated on the record, Mrs. Godwin said she was confused, "[s]he believed that they were receiving bad advice, that Mr. Behrend had recommended against the settlement, and that Mr. Behrend was charging what she concluded were unreasonable fees which would prevent the Godwins from recovering virtually any money from this case." App. at 647a. The judge stated that the Godwins "were in a quandary as to what to do," and he told her he would address the matter at the conference on Monday morning. *Id.* After this conversation the Godwins decided to accept the government's offer. A settlement conference was held December 13, and the events that transpired there are critical to this appeal.

The district court began the conference by reviewing the settlement agreement, and ruled that the only viable claims were those for the Godwins and not for their children. He then turned to the matter of lawyers' fees, referred to the statutory limit of 25 percent, stated that "no claim or demand for counsel

fees may be made for any service rendered by the Veterans Administration in the future," and stated that counsel fees would be $281,250, or 25 percent of the cash settlement of $1,125,000. App. at 609a. Behrend did not object nor did he make any reference to the settlement sheet which had been signed the month before. The participants discussed the purchase of an annuity by the government for the Godwins with some of the proceeds. Behrend then stated that he didn't want to take any responsibility for the enforcement of the agreement because it failed to give the Godwins the "unfettered right to go to civilian medicine." The court stated the agreement was enforceable by an injunction against the Veterans Administration if necessary. A significant colloquy then took place, quoted in full in the appendix to this opinion, during which the district court asked:

> Now, are you satisfied with your lawyer?
>
> MR. GODWIN: Yes.
>
> MRS. GODWIN: My understanding is he will be paid off in full?
>
> THE COURT: Yes.

App. at 619a. The judge reiterated that the Godwins should not pay any fee beyond the amount that had been stated. Behrend said that "we are abiding by, of course, the statute, the $281,250," and asked the court whether he would be able to collect approximately $60,000 in expenses. The judge instructed Behrend to file a petition and stated he would decide if any such expenses are recoverable. During this second discussion of fees and expenses, Behrend again failed to mention the settlement sheet. In an order dated December 15, 1982, the court directed payment of $281,250 to Behrend, Aronson & Morrow.

On December 20 Behrend notified the court that he intended to press a claim for $522,750. Shortly thereafter the Godwins discharged him as their counsel. At a second settlement conference on December 30, 1982, the Godwins expressed their confusion over the amount of the fee. The Godwins referred to letters they had been getting from Behrend. The district court stated its recollection "that before our last conference I directed a question to Mr. Behrend, inquiring whether he intended to charge a fee on the future medical expenses. And it is my recollection that he answered that question in the negative." Behrend replied, "Judge Ziegler, we are not charging on future medical expenses; we are charging on the present worth of those medical expenses," and stated, "I make it very clear that we are going to assert a claim in the amount of some $521,000." App. at 644a. The Assistant United States Attorney confirmed his recollection that Behrend told the court at the earlier conference there was never any agreement to compute attorney's fees on the value of future medical benefits, and the attorney for the third party defendants also stated he "had the impression that [the court was] under the impression that he said there was no such agreement." App. at 645a. The court directed that the order of December 15 awarding counsel fee at $281,250 would stand.

Behrend filed a motion for reconsideration of attorney's fees and a petition for assessment of costs. Both were denied by an opinion and orders dated January 18, 1983.

In its opinion sur Behrend's motion for reconsideration, the trial court held that the only power of attorney of record, that dated November 18, 1980, was void, or at least voidable by plaintiffs, because the provision that counsel shall receive 40

percent of any recovery violated the mandate by Congress in 28 U.S.C. § 2678 that no fee under the federal tort claims statute shall exceed 25 percent. The court held that counsel had not shown that the letter of August 3, 1981 (reducing the fee to 25%) had been accepted, and that the settlement sheet, the only document which referred to the need to pay a fee based on the average value of the medical care to be provided, could not be considered an enforceable contract because it lacked valuable consideration.

The court also held that even if the settlement sheet constituted a contract, it was unenforceable on grounds of public policy, illegal, and obtained in violation of DR 2-106(A) of the Code of Professional Responsibility. The court characterized counsel's conduct as the most "egregious example of overreaching by a lawyer" encountered by the court "in 10 years of public service and 22 years at the bar," App. at 14a, and also criticized the caliber of representation by counsel, giving specific examples. App. at 20a-21a.

In addition to limiting counsel fees to 25 percent of the cash payment, the court denied counsel's motion for an award of costs in the sum of $62,015.19 both because counsel had no contract for reimbursement of costs with Godwin in the letter of August 3, 1981, and because the denial "is an appropriate sanction for a lawyer who intentionally attempts to extract an illegal fee from a person to whom Congress and the Supreme Court have accorded special consideration."

Behrend appealed from the district court's three orders, and the appeals were consolidated before this court. The Godwins and the United States have each filed a brief as appellees in support of the orders of the district court. The Pennsylvania Trial Lawyers Association has filed a brief amicus curiae in support of Behrend's position.

II.

ATTORNEY'S FEES

A. *Structured Settlements*

Appellant and the amicus curiae suggest that the district court's decision will hinder the development of structured settlements and that the advantages of such settlements will be lost to the parties and the judicial system. Generally, a structured settlement entails a cash payment made on settlement, sufficient to cover at least special damages such as medical bills incurred and past lost wages, and guaranteed periodic payments in the future. Such payments are commonly funded by an annuity policy. This settlement technique has been both applauded and criticized. Its proponents point to the tax free status of the payments if certain requirements are observed and the "spendthrift preventative nature" of periodic payments. *See, e.g.*, 7 R. Conason, Damages in Tort Actions §§ 82.20, 83.02 (1982); Krause, *The Benefits of Structured Settlements*, N.Y. St. Bar J., Jan. 1982, at 13. Critics stress that the defendant's insurance company might not pass on to the plaintiff some of the cost savings achieved through this form of settlement, and that the possibility of carrier insolvency is also a significant drawback. *See, e.g.*, Broder, *Structured Settlements: The Argument Against*, 1981 Pers. Inj. Ann. 838. All agree that the manner in which contingent fees are to be computed in a structured settlement with periodic payments, particularly when there is a reversion in the event of death, poses a dilemma. *See* Conason at § 83.3.

Since the use of a structured settlement as a vehicle for resolving major tort litigation is "still in its embryonic stages", *see* Hyland & Keeley, *Using the Structured Settlement*, Nat'l L. J., Dec. 19, 1983, at 15, it is unlikely that Congress contemplated how such

benefits were to be calculated in the 1966 revision of section 2678 of the Federal Tort Claims Act. That provision states, in relevant part, "No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered . . . or settlement made" in a federal tort claim. 28 U.S.C. § 2678 (1982).

This replaced the requirement in the original statute under which the district court was to determine and allow a reasonable attorney fee of up to 20 percent of the recovery. The requirement of district court approval of the fee in each case had proved burdensome. The authors of the 1966 amendment explained, "The actual amount of attorneys fees within the statutory limit . . . is made a matter for determination between the litigant and his attorney." S. Rep. 1327, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 2515, 2521. To ease court congestion, the 1966 Act also provided for administrative settlement of tort claims. *Id.* at 2516. At the same time that Congress provided for determination of the fee by the parties, it also sought to discourage attorney overreaching by keeping in place the language penalizing attorneys who do not abide by the 25 percent limitation.[3] *See United States v. Cohen*, 389 F.2d 689, 691 (5th Cir. 1967); *Schwartz v. United States*, 381 F.2d 627, 631 (3d Cir. 1967).

The application of the 25 percent limit to structured settlements has rarely been considered. In a state court case, the Superior Court of Pennsylvania distinguished between an award of counsel fees where

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3. That language is, "Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both." 28 U.S.C. § 2678 (1982).

the settlement formula is based on the right to receive future payments with the present value of the future projected loss immediately paid to the victim, and an award of counsel fees which the attorneys seek to base on a sum the client may never receive. In *Johnson v. Sears, Roebuck & Co.*, 291 Pa. Super. 625, 629, 436 A.2d 675, 677 (1981), the court held that attorney's fees may only be based on amounts actually received by their clients. Thus, the *Johnson* court held that where the future payments were funded by an annuity policy, the cost of the annuity represented the base on which attorney's fees were due. 291 Pa. Super. at 630, 436 A.2d at 678. The dissenting judge would have used the present value of the future benefits as determined by actuarial tables as the basis for computation of the fee.

Not only is there a difference of opinion as to computation of the fee when the settlement provides for payment of fixed sums in the future, but the situation becomes yet cloudier when the settlement contains an item, such as the provision of future medical services, which carries the inherent contingencies of type, quantity and future cost of service as well as of the victim's future medical condition and life expectancy. When the ultimate value of the settlement is uncertain, clients may be paying the lawyer more than the statutory 25 percent of what they actually will receive if the beneficiary dies before the passage of the anticipated period upon which the settlement was based.

It may be, as appellant suggests, that contingent services are susceptible of determination by experts and reducible to present value. If so, computation of counsel fee on such a basis may not violate the literal terms of the statutory maximum fixed by section 2678, provided there are adequate findings by the district court as to present value supported by the record.

Nonetheless, we see substantial difficulties that may arise in applying section 2678 to deferred payment settlements or settlements based on provision of contingent services. In enacting the Federal Tort Claims Act in 1946, Congress showed a special solicitude for persons injured by federal officers. The limitation of the amount of counsel fee reflects congressional concern that the victims of federal torts be treated fairly and equitably. *See* S. Rep. 1327, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 2515, 2521. Nothing in the legislative history of the 1966 amendments suggests that there was any diminution of this congressional concern.

It is apparent that if an attorney demands payment of a fee based on the value of deferred payments reduced to present value, the federal victim may be left destitute. For example, a settlement providing for $100,000 cash at time of signing and future payments which, reduced to present value, can be found to be worth an additional $400,000, may generate a demand for prompt payment of counsel fee in the amount of $125,000, representing 25 percent of the settlement value of $500,000. Even though this amount is within the statutory limit, a requirement that the tort victim produce the funds for the fee at that time would not only exhaust the immediate payment but could put the client in debt and subject to attachment of assets. As is known, such matters are not always resolved amicably between counsel and the client.

In the above illustration, the concern is not the amount of the fee but the method of payment. If the lawyer's payment were tied to payments as received by the client, the problem for the client would be alleviated. However, this approach was rejected by the Seventh Circuit. In *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981), a settlement award of $900,000 for

a rubella syndrome child provided for cash payment of $300,000 and the remainder in the form of a reversionary trust, with the money to be disbursed as needed to care for the child and the remainder, if any, to revert to the government at her death. The district court limited the attorney's fee to amounts proportional to and concurrent with disbursement of the funds. 503 F. Supp. 983, 984-85 (1980). In reversing on this issue, the Seventh Circuit held the trial court exceeded its authority under section 2678.

Robak is distinguishable from the facts before us because the $600,000 balance was set aside in the trust for the plaintiff's benefit, albeit payment was contingent on the child's survival. Therefore, we venture no opinion as to whether we would be inclined to follow that circuit's approach. We note that in *Johnson*, the Pennsylvania Superior Court also characterized payment of attorney's fees as a percentage of each future periodic payment to the client as "both unwieldly and impractical", 291 Pa. Super. at 630, 436 A.2d at 678, even though the court recognized that the Pennsylvania Workmen's Compensation Act mandates this method of payment.

When the settlement provides for future services, rather than funds, the concomitant difficulty in setting the appropriate fee is compounded. The district court here focused on the contingent nature of the benefit to Godwin when it stated of the fee demand, "It is illegal because 25 percent of an unknown is zero." App. at 17a. The district court appears to have taken too narrow a view of section 2678. The parties may anticipate varying forms of damage awards and tailor counsel fees accordingly. There is no indication that Congress intended to prohibit a litigant and attorney from agreeing, for example, to forgo a large cash award in favor of a substantial package of benefits, to assign a

present value to the benefits and to allot the lawyer a share of that figure. The lawyer's share would not be more than s/he bargained for at the outset of the litigation. *See Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1111 (3d Cir. 1979).

It is unfortunate that the 1966 Amendments removed the requirement for district court approval of counsel fees in all federal tort claims actions. In cases where the settlement is in a form other than a lump sum cash award, district court supervision and approval could obviate many of the problems referred to above. Indeed, the district court may have inherent authority in such cases. *See, e.g., Dunn v. H. K. Porter Co.*, 602 F.2d at 1112 n.10; *Schlesinger v. Teitelbaum*, 475 F.2d 137, 140 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973). In light of the competing social policies and the absence of any congressional illumination, it would be preferable if Congress were to determine the most efficacious method to encourage innovative forms of settlement without chilling or penalizing counsel who have pursued settlements that maximize their clients' benefit and conserve judicial resources, *see Robak*, 658 F.2d at 480 n.28, and at the same time, to protect federal tort victims from unreasonable payments to their lawyers. Until Congress sheds light on these questions, we suggest *infra* a number of considerations relevant to an evaluation of fees based on future services in a structured settlement. *See* typescript at 18.

B. Waiver of Additional Counsel Fee

Because of the unique circumstances of this case, we can dispose of the appeal without applying section 2678 to the counsel fees. We agree with appellees Godwins and the United States that Behrend is precluded from seeking a larger attorney fee by the

doctrine of equitable estoppel, which prevents a party from assuming a position inconsistent with an earlier position upon which another party relied. *See Blofsen v. Cutalar*, 460 Pa. 411, 417, 333 A.2d 841, 843-44 (1975); *Northwestern National Bank v. Commonwealth*, 345 Pa. 192, 196-97, 27 A.2d 20, 23 (1942). *See also Morrison-Knudsen Co. v. Rocky Mountain Chapter, N.E.C.A.*, 370 F.2d 463, 467 (10th Cir. 1966).

Before the beginning of the December 13, 1982 conference, in response to the court's inquiry, Behrend specifically denied that he had an agreement for counsel fees based on future medical services. *See* App. at 647a. His subsequent explanation that what he was seeking was not a fee based on future medical services but rather a fee based on the present value of such services, App. at 643a, is simply unpersuasive.

If indeed there had been any misunderstanding, as Behrend contends, he had ample opportunity to clarify his position during the conference on December 13. On several occasions during that conference, the district court stated that Behrend's fee would be $281,250, 25 percent of the cash award. App. at 609a, 610a. Behrend stated thereafter that he was "abiding by . . . the $281,250.00." App. at 621a. He did not produce or mention the settlement sheet that he had given the Godwins the month before. It was not until after the court's order directing payment of $281,250 to Behrend's law firm that Behrend notified the court of his intention to seek nearly twice that amount.[4] The court subsequently stated that after this discussion at the conference on December 13 regarding the counsel

4. In the meantime the Godwins had begun negotiating the purchase of an annuity with part of their cash award. According to the appellant's own figure, the new demand would have taken 46 percent of the Godwins' cash award.

fee "the Godwins stated on the record that they felt the settlement was fair and reasonable." *See* App. at 647a.

These circumstances provide an adequate basis to affirm the district court's order with regard to the amount of attorney's fees. Our standard on review is whether the court abused its discretion, *see, e.g., Dunn v. H.K. Porter Co.*, 602 F.2d at 1112 n.10; *Schlesinger v. Teitelbaum*, 475 F.2d at 140, a standard which places a considerable burden on appellant. *See Lindy Brothers Builders, Inc. v. American Radiator*, 540 F.2d 102, 115-16 (3d Cir. 1976). As this court explained in *Dunn*, the factors to be considered by the trial court include

> the manner into which the contract was entered, the status and sophistication of the plaintiffs, whether the source of the fee payment is a settlement fund or a tax against the defendants, the size of the proposed award and whether the fee allowed is sufficient to encourage capable counsel to undertake such litigation in the future.

602 F.2d at 1110. Most of these factors were referred to by the district court in its opinion. App. at 19a-21a.

We do not imply that a fee may not be based on the value of services to be provided the client in the future where that possibility has been fully explained to the client at the time the fee contract is signed, the services to be provided are clearly the product of the litigation and/or the settlement negotiations, the services are susceptible of accurate monetary evaluation and reduction to value, and there are findings by the trial court on the value of the services and the equity to the plaintiffs of the proposed method of payment. In this case, these factors are conspicuously absent.

The nature and applicability of a contract, if any, between the Godwins and Behrend covering the fees to

be paid in litigation with the United States is ambiguous. Behrend's reliance on the November settlement sheet is troublesome because it was signed only after conciliation conferences had been conducted and settlement was on the way, and after Behrend had written the district court on September 29 requesting that action on the issue of counsel fee be deferred. App. at 56a. Although an associate of Behrend averred that he went over the settlement fee with Mr. Godwin, it is undisputed that the document was signed by Mr. Godwin while he was in the VA Hospital having his airway dilated, and on his release he took it home for his wife's signature in Ohio, App. at 633a, facts which do not appear to comport with the lawyer's obligation to make discussion of fees "part of the full consideration with the client of all aspects of a structured settlement . . . ." Lampo & Waldeck, *Structured Settlements: A Primer*, 39 J. Mo. Bar 181, 186 (1983). *See also* 7 R. Conason, Damages in Tort Actions § 83.03(3), .03(6).

In light of all the circumstances in this case, we cannot hold that the district court abused its discretion in denying Behrend's petition for additional counsel fee.[5]

---

5. In light of our disposition, we do not reach the district court's apparent finding that Behrend was not responsible for obtaining the benefit of the medical services. In its opinion, the district court stated that "[p]laintiffs will receive those benefits to which they are entitled whether they retained counsel or not", that the VA provided medical care for 2 1/2 years before the settlement, for seven months before counsel even secured a power of attorney, and that "the promise to continue such care in the future bears little relation to counsel's efforts." App. at 16a. We have some difficulty reconciling these statements with the court's earlier statement that "[i]f Mr. Godwin proceeds to judgment in this case rather than accept a proposal by the United States by virture of that judgment, he will not qualify for future treatment by the Veterans Administration." App. at 602a. We need not resolve this issue.

III.

Costs and Expenses

Behrend also appeals from the denial of his "right to be reimbursed for the substantial legal costs and expenses incurred in representing the Godwins," appellant's brief at 34, which total $62,015.19. We need not reach the district court's holding that costs can be denied as an appropriate sanction for what the court regarded as Behrend's attempt to extract an illegal fee. Instead, we affirm the court's denial of costs on another basis.

As set forth above, the district court gave Behrend leave to file a petition for reimbursement of expenses.[6] The petition filed by Behrend evidently sought costs from the United States as it named the Godwins as petitioners and asked that "this Honorable Court award them costs of $62,015." App. at 187a-88a. The statute providing for costs in suits against the United States limits a judgment for costs to the "prevailing party." 28 U.S.C. § 2412 (1982). Although the settling party is the "prevailing party," *see Maher v. Gagne*, 448 U.S. 122, 129-30 (1980), the settlement agreement provided for "full settlement and satisfaction of any and all claims," which extinguished the Godwins' claim, and Behrend's derivative claim, if any, for reimbursement from the Government.

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6. At the conference on December 13, 1982, Behrend indicated that he sought recovery of expenses from the Godwins, since he stated, "We have discussed with Mr. and Mrs. Godwin that our expense on their behalf was about $60,000, and whether they intend to pay that or not should be mentioned. In your statement it appeared as though they would not pay that." App. at 621A. In response, the court stated, "The way we will handle any claim for expenses in prosecuting this case is that Mr. Behrend will file a petition with the Judge. The Judge will look at it. If he decides any such expenses are recoverable, an Order will be entered." As pointed out in the text, Behrend did not file a petition for reimbursement from the Godwins.

Behrend's position is somewhat equivocal but he does not appear to contend that he is entitled to reimbursement from the Godwins. The district court found that there was no contractual basis on which to award such reimbursement, and we agree. As the court viewed the documents, only the letter from Behrend to the Godwins dated August 3, 1981 could be deemed an implied contract, and that document "failed to include any provision for reimbursement of costs." App. at 21a. Furthermore, if Behrend had any viable claim against the Godwins for costs, it has not been preserved. In response to the court's invitation to file a petition for expenses, Behrend filed a petition on behalf of the Godwins, not one on behalf of himself seeking recovery from the Godwins. It was the petition on behalf of the Godwins that the district court denied, and which is the subject of this appeal. Since there is no basis for awarding costs against the government, and no petition for reimbursement of costs from the Godwins was timely filed by Behrend and has therefore been waived, we will affirm the district court's order denying costs.

For the reasons set forth, the judgment of the district court will be affirmed.

APPENDIX

Excerpt of Conference on December 13, 1982

Now, are you satisfied with your lawyer?

MR. GOWIN: Yes.

MRS. GODWIN: My understanding is he will be paid off in full?

THE COURT: Yes. Do you have any complaints about any representation that you have received in this case?

MRS. GODWIN: Do you?

It is very confusing.

THE COURT: We are here to try to make it understandable.

MRS. GODWIN: Somewhere along the line I misunderstood, and so did my husband.

THE COURT: Well, you understand that you do not have to pay anything on medical in the past or in the future; do you understand that?

MRS. GODWIN: Yes, sir.

THE COURT: And if anyone should make such a claim, I want you to bring it to my attention immediately. What we have addressed here is what you will receive and what your lawyer will receive, and to protect your lawyer I am obligated to inquire whether you have any questions or any complaints at this time, because they should be put on the record.

MRS. GODWIN: I have the question of, if we have another contract with our lawyer, other than the agreement, my understanding is that he has been paid?

THE COURT: The payment to lawyers under these types of cases are controlled by the Court. And any agreement to the contrary is now void.

MRS. GODWIN: Okay.

THE COURT: And you should not pay any bill to anybody other than what I have indicated unless I otherwise order it. Do you understand that?

MR. GOWIN: Yes.

THE COURT: And you are free to call my office at any time to adivse me of any claims or demands by anybody, any of your present lawyers or any other lawyers who may come to see you. Do you understand that?

MRS. GODWIN: Yes, Sir.

THE COURT: And if anybody harasses you or bothers you down there, while I am not policeman, I do have certain responsibilities, and I will be pleased to listen to any problems that may occur in the future.

MRS. GODWIN: Yes.

THE COURT: Do you understand that?

MRS. GODWIN: Yes, Sir.

Do you?

MR. GODWIN: Yes.

MR. BEHREND: I want to bring something up Your Honor said, and we are abiding by, or course, the statute, the $281,250.00. We have discussed with Mr. and Mrs. Godwin that our expense on their behalf was about $60,000.00, and whether they intend to pay that or not should be mentioned. In your statement it appeared as though they would not pay that.

THE COURT: I want to repeat what I said. You are to pay no one anything unless otherwise ordered by the Court. The way we will handle any claim for expenses in prosecuting this case is that Mr. Behrend will file a petition with the Judge. The Judge will look at it. If he decides any such expenses are recoverable, an Order will be entered.

What I want to avoid is you people receiving a bill now, in the next year or in the future for legal fees, expenses incurred, or other types of costs. Don't pay them unless otherwise ordered by the Judge. Do you understand?

MR. GODWIN: Yes.

MRS. GODWIN: Yes.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD *CIRCUIT*

No. 83-5065, 83-5129, 83-5130

ALTON GODWIN and KAREN GODWIN, his wife

v.

VICTOR SCHRAMM,
UNITED STATES OF AMERICA

Kenneth W. Behrend, and Behrend, Aronson and Morrow,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges, and GREEN, District Judge*

The petition for rehearing filed by
Kenneth W. Behrend, and Behrend, Aronson and Morrow, Appellants,

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

23a

Circuit Judge

Dated: MAY 4 1984

* Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

TO

U. S. COURT OF APPEALS, THIRD CIRCUIT

U.S. DISTRICT COURT WESTERN DISTRICT OF PENNSYLVANIA at Pittsburgh
(District/State) (Location)

U.S. COURT OF APPEALS
DOCKET NO. _____
(Leave Blank)

FULL CAPTION IN DISTRICT COURT AS FOLLOWS:

ALTON GODWIN and KAREN GODWIN, his wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

EYE AND EAR HOSPITAL, DALE MacMURDO,
FRANK KAISER, HOWARD F. ARMOUR,
Third-Party Defendants.

DISTRICT or TAX COURT DOCKET NO. CA-81-856

DISTRICT or TAX COURT JUDGE Donald E. Ziegler

Notice is hereby given that Plaintiffs
(Name Party)
in the United States [illegible] from [illegible]
(X) Order [illegible] Other (Specify) "It is Ordered that the United States shall issue a check payable to Alton Godwin and Karen Godwin, his wife, in the s of $45,750. and It is Further Ordered that the United States shall issue a separate check payable to Behrend, Aronson and Morrow in the sum of $281,250 for services rendered pursuant to 28 U.S.C. § 2678"
entered in this action on December 15, 1982.
(Date)

[illegible]
(Counsel for Appellant-Signature)

Kenneth W. Behrend
(Name of Counsel-Typed)

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(412) 391-2515
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Anthony M. Mariani
(Counsel for Appellee)

633 U.S. Post Office & Court House
(Address)

Pittsburgh, PA 15219

(412) 644-6857
(Tel. No. - U.S. Govt. Att'y or Other)

[illegible]

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON GODWIN and KAREN GODWIN, his wife,	)	
Plaintiff,	)	
vs.	)	Civil Action 81-856
UNITED STATES OF AMERICA,	)	
Defendant and Third-Party Plaintiff	)	
vs.	)	
EYE AND EAR HOSPITAL, DALE McCURDO, FRANK KAISER, HOWARD F. ARMOUR,	)	
Third-Party Defendants.	)	

ORDER OF COURT

AND NOW, this 18th day of January, 1983,

IT IS ORDERED that the motion of the United States of America shall be and hereby is granted.

IT IS FURTHER ORDERED that the motion of Kenneth W. Behrend, Esquire and the law firm of Behrend, Aronson & Morrow for reconsideration of the award of attorney's fees shall be and hereby is denied.

IT IS FURTHER ORDERED that the motion of Kenneth W. Behrend and the law firm of Behrend, Aronson & Morrow for assessment of costs and expenses shall be and hereby is denied.

IT IS FURTHER ORDERED that the motion filed by Kenneth W. Behrend and the law firm of Behrend, Aronson & Morrow on behalf of

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plaintiffs, after they were discharged as counsel, for indemnification for counsel fees and expenses against the United States shall be and hereby is denied.

IT IS FURTHER ORDERED that Kenneth W. Behrend and the law firm of Behrend, Aronson & Morrow shall be and hereby are ordered to refrain from pressing any claim or demand in any court against plaintiffs for any fee, expense or cost unless otherwise authorized by the court.

Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Counsel of record

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CERTIFICATE OF SERVICE

I certify that I have this 2nd day of August, 1984 served three copies of the within Petition for Writ of Certiorari by first class mail, postage pre-paid upon each of the following: ROBERT A. ZUNICH, Zimmer and Dice, 584 Allegheny Avenue, Oakmont, PA 15139, PAUL J. BRYSH, Assistant U.S. Attorney, U.S. Attorney's Office, 633 U.S. P.O. and Courthouse, Pittsburgh, PA 15219 and NEIL L. CONWAY, Harrigan, Kluger, Spohrer & Quinn, 700 United Penn Bank Building, Wilkes-Barre, PA 18701. I have also made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by serving three (3) copies of this foregoing Petition for Writ of Certiorari by first class mail, postage pre-paid. I further

certify that all parties required to be served have been served.

BY _____

Charles S. Morrow
1320 Grant Building
Pittsburgh, PA 15219

_____

Paul J. Votilla
1326 Grant Building
Pittsburgh, PA 15219

Counsel for
Petitioners

Office - Supreme Court, U.S.
FILED
SEP 7 1984
ALEXANDER L. STEVAS
CLERK

No. 84-203

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH W. BEHREND AND
BEHREND, ARONSON AND MORROW, PETITIONERS

v.

ALTON GODWIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITES

Page

Cases:

Morrison-Knudson Co. v. *Rocky Mountain Chapter, N.E.C.A.*, 370 F.2d 463 5

Robak v. *United States*, 658 F.2d 471 5

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346(b) 1

28 U.S.C. 2671 *et seq.* 1

28 U.S.C. 2678 ..... 2, 3

38 U.S.C. 4116 2

38 U.S.C. 4116(c) 2

Miscellaneous:

Model Code of Professional Responsibility (1983) 3

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v.

ALTON GODWIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the court of appeals' holding that they are equitably estopped from receiving attorney's fees and costs in excess of the $281,250 that they already have been awarded in this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*

1. Petitioners are attorneys who were retained by respondents Alton and Karen Godwin in connection with a severe injury sustained by Mr. Godwin during surgery in a Veterans Administration (VA) hospital (Pet. App. 2a). The Godwins initially signed a power of attorney guaranteeing petitioners a contingent fee of 40% of all funds recovered through prosecution of the Godwins' claims (*ibid.*).

Petitioners accordingly filed suit on behalf of the Godwins in Pennsylvania state court against the surgeon involved in the operation (Pet. App. 3a). The United States

subsequently substituted itself as defendant, removed the case to the United States District Court for the Western District of Pennsylvania pursuant to 38 U.S.C. 4116, and impleaded several third party defendants (Pet. App. 3a). After the action had been removed to federal court, petitioners sent the Godwins a letter stating that their fee would "be limited to 25 percent of the total gross recovery" because "your damages are, indeed, more substantial than was understood at the time the Power of Attorney was signed" (Pet. App. 3a). The letter failed to inform the Godwins that the fee reduction was mandated by 28 U.S.C. 2678, however.[1]

A settlement eventually was negotiated that provided the Godwins with a cash payment of $1,125,000 and Mr. Godwin with lifetime medical care and treatment at a VA hospital. Petitioners drew up and presented to the Godwins a sheet outlining the terms of the proposal. This sheet projected a financial value for Mr. Godwin's future medical care and, based upon this estimate, calculated the full value of the settlement at $2,091,000. Petitioners listed their fee as $522,750, or 25% of the settlement figure, and also provided for payment upon settlement of approximately $60,000 in expenses. The Godwins ultimately decided to accept the government's offer, and they signed the settlement sheet.[2]

At the settlement conference the district judge directed that "no claim or demand for counsel fees may be made for any service rendered by the Veterans Administration in the

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[1]Cases removed to federal court under 38 U.S.C. 4116 are treated as FTCA actions. 38 U.S.C. 4116(c). Attorney's fees in FTCA cases are limited to 25% of the judgment or settlement by 28 U.S.C. 2678.

[2]Before accepting the offer Mrs. Godwin telephoned the district judge; she informed him that the Godwins were receiving bad advice and that petitioners' unreasonably high fees would prevent the Godwins from receiving a substantial cash award. The judge responded that he would address the matter at a scheduled conference.

future," and he several times stated that counsel fees should be $281,250, or 25% of the cash settlement of $1,125,000 (Pet. App. 5a-6a, 15a). Petitioners did not object to these statements or make any reference to the settlement sheet that had been signed a month earlier, declaring only that "we are abiding by, of course, the statute, the $281,250" (Pet. App. 6a).

Two days after the settlement conference, the court issued an order directing payment of $281,250 to petitioners. Five days later, however, petitioners notified the court that they intended to press a claim for $522,750, basing this demand on "the present worth of those [future] medical expenses," rather than "on [the] future medical expenses" themselves (Pet. App. 7a). This claim was rejected by the court (*ibid.*).

Petitioners then filed a motion for reconsideration and a petition for costs, both of which were denied by the district court. The court explained that the original power of attorney was voidable by the Godwins because the 40% contingent fee violated 28 U.S.C. 2678 (Pet. App. 7a-8a). The court also ruled that the fee agreement outlined in the settlement sheet lacked consideration and therefore did not constitute an enforceable contract, and that the agreement was in any event unenforceable as contrary to public policy (Pet. App. 8a).[3] An award of costs was found improper because petitioners had no contract for reimbursement with the Godwins.[4] In all, the district judge characterized counsel's conduct as the most "egregious example of overreaching by a

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[3]The court explained that the contingent fee arrangement had been obtained in violation of DR 2-106(a) of the Model Code of Professional Responsibility (1983) (Pet. App. 8a).

[4]The court also declared that the denial of costs "is an appropriate sanction for a lawyer who intentionally attempts to extract an illegal fee from a person to whom Congress and the Supreme Court have accorded special consideration" (Pet. App. 8a).

lawyer" that he had encountered "in 10 years of public service and 22 years at the bar" (Pet. App. 8a).

On petitioners' appeal the court of appeals affirmed the denial of a further fee award. The court of appeals held that the doctrine of equitable estoppel barred petitioners from seeking a larger award of fees both because they had stated their intention to accept the $281,250 award, and because they specifically had denied the existence of a claim for fees based on future medical services (Pet. App. 15a-17a). The Godwins had relied on this disclaimer by beginning negotiations for the purchase of an annuity with their cash settlement (*id.* at 15a n.4).[5] The court of appeals also held that any claim for costs against the United States had been extinguished by the settlement agreement, which provided the "full settlement and satisfaction of any and all claims" (Pet. App. 18a), while the Godwins were not contractually obligated to reimburse petitioners for costs. In reaching these conclusions the court of appeals explained that the existence of equitable estoppel made unnecessary a determination whether, as the district court originally had ruled, an attorney's fee may not be based upon the value of the future services component of a settlement (Pet. App. 14a, 16a).

2. Petitioners' suggestion that the decision below involves novel issues relating to the award of attorney's fees is incorrect. To the contrary, the court of appeals simply and properly held that the doctrine of equitable estoppel barred an award of additional fees, given petitioners' stated willingness to abide by the $281,250 award, their less than forthright dealings with the Godwins, the Godwins' reliance

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[5]The court of appeals observed that the status of the contractual relationship between petitioners and the Godwins was "ambiguous" because petitioners had failed to discuss the fee arrangements fully with their clients (Pet. App. 17a).

upon petitioners' disclaimer of a higher fee, and the ambiguous nature of the fee agreement. See *Morrison-Knudson Co.* v. *Rocky Mountain Chapter, N.E.C.A.*, 370 F.2d 463, 467 (10th Cir. 1966). Such an essentially factual determination does not merit this Court's review. The court of appeals' further conclusion that neither the settlement agreement nor petitioners' contract with the Godwins provided for an award of costs is of equally limited importance.

Having determined that petitioners were equitably estopped from obtaining additional fees, the court below did not decide when or whether fees based on structured settlements may be awarded.[6] As a result, this case does not provide an appropriate vehicle for addressing the operation of the FTCA's 25% limit on fees in actions involving such settlements.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1984

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[6]The court of appeals expressed "no opinion as to whether [it] would be inclined to follow" the decision in *Robak* v. *United States*, 658 F.2d 471 (7th Cir. 1981), which held that when a portion of a settlement award will be paid in the future the attorney's fee based upon that award may be paid in the present (Pet. App. 13a).

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

No. 84 - 203

KENNETH W. BEHREND and
BEHREND, ARONSON and MORROW

Petitioners,

v.

ALTON GODWIN et al.,

Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT COURT

REPLY MEMORANDUM OF PETITIONERS

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Counsel for
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October 2, 1984

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES:	PAGE
Woods v. City Bank Co.	
312 U.S. 262, 61 S.Ct. 493,	
85 L.Ed. 820 (1941)	6
Frankel v. Heyin.	
466 F.2d. 1226	2,3,4
STATUTES:	
Federal Tort Claims Act	
28 U.S.C. 2671 et seq.	2,3
28 U.S.C. 2678, 2679	2,8
28 U.S.C. 1346	2
DR 2-106(a)(b), 28 Pa.C.S.A.	6,7,8

IN THE

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OCTOBER TERM 1984

NO. 84-203

KENNETH W. BEHREND and
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Petitioners,

v.

ALTON GODWIN and KAREN GODWIN,
and VICTOR SCHRAMM, UNITED
STATES OF AMERICA.

Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY MEMORANDUM OF PETITIONERS

In the instant proceedings the Respondent, United States of America, has submitted a Memorandum in Opposition to the Petition for Writ of Certiorari to the

United States Court of Appeals for the Third Circuit. The said memorandum has improperly characterized the Petitioners' prayer for relief as a request for review of the Court of Appeals application of an equitable estoppel to foreclose Petitioners' claim for a fee from the undefined and uncalculated amount of the future benefit aspect of a structured settlement. Respondent has neither addressed nor offered precise counter authority to the crucial issue which the petition, in fact, raised, to wit: that the courts below committed fundamental reversible error by assuming jurisdiction under the Federal Tort Claims Act, over an element of damages which had not been mandated by the Congress as a province of the federal courts under 28 U.S.C. Sec. 1346, Sec. 1346(b), Sec. 2671 et seq. and

Sec. 2679(b). Unanswered by the respondent is the force of Frankel v. Heyin et al. 466 F.2nd 1226 (3rd Cir. 1982) which sustained the District Court's rejection of a United States' demand for a judgment which included a provision for indefinite future payments and interim progress payments of attorney fees as the trust funds were paid out to the plaintiff.

Respondent here has offered no authority nor addressed any argument to petitioners' premise that under Frankel, the United States Attorney lacked the executive capacity to contract a settlement under Sec. 2672 of the Federal Tort Claims Act (28 U.S.C.A. Sec. 2672) which was not stated in "money damages." Nor has the respondent come forth with an answer to Judge Hastie's teaching under

Frankel that a district court in administering the Federal Tort Claims act should not make other than lump sum money judgments unless and until Congress shall authorize a different type of award. (Emphasis supplied. See Frankel supra pp. 1228-1229). Respondent's opposition memorandum reasserts the estoppel and waiver considerations upon which the Circuit Court grounded its affimation of the District Court's denial of petitioners claims for asserted attorney fees and suit preparation expenses. Your petitioner respectfully submits that inasmuch as the U.S. attorney respondent and the Courts below under Frankel had no power to act on the future benefit element of the consented judgment it was in legal effect a nullity, which could not be cured by agreement of the respondents over the

persistent objection of petitioner. The future benefit package continues vague and uncertain in not positively circumscribing respondents' Godwins monetary entitlement and in its present form is questionably vulnerable to collateral attack by either of the respondents.

In answer to respondent's contention that petitioner had waived any right to the claim for litigation preparation expenses, petitioner asserts that the oblique procedure ordered by the district court deprived him of the fundamental fairness to which a claimant or possible litigant is entitled. In this respect, the petitioner asserts that the district court committed fundamental error in not only failing to conduct an evidentary hearing on the issue of feeentitlement

(when the fact of attorney fees surfaced as an issue) but also erred when it truncated petitioner's claim for record costs and trial preparation expenses by way of a colloquial courtroom meeting of the parties involving neither a pleading framework nor the taking of any testimony. The order of the district court directing petitioner to present his claim for costs within 30 days and denying the same without a hearing, deprived petitioner of the congressionally mandated procedure for the assertion of record costs and likewise his substantial contract claim under the Federal Rules of Civil Procedure.

In the face of this procedure petitioner was precluded from asserting a claim for the quantum meruit value of trial preparation expense pursuant to this court's doctrine in Woods v. City Bank

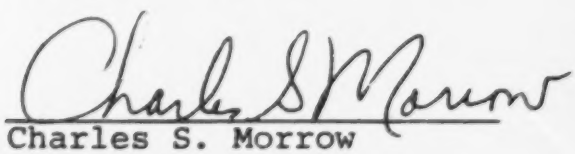
Co. 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941). Petitioner submits that the further action of the district court in asserting DR 2-106(a) of the Model Code of Professional Responsibility (which was established as a guideline for deciding the reasonableness of contingent fees) as authorityfor extinguishing a contract claim on the basis of exacting a penalty is clearly erroneous and subject to this Honorable Court's supervision apart from any consideration argued above. The district court neither noticed petitioner in advance that the said rule was controlling in the suit expenses claim nor did it demonstrably follow the eight step procedure set forth in the rule which could not be implemented without an evidentiary hearing (see DR 2-106(b), 42 Pa.C.S.A).. The inapplicability of the

said Rule in the instant premises was acutely accented in the recent action of the Disciplinary Board of the Supreme Court of Pennsylvania of September 14, 1984, wherein it formally dismissed a complaint against individual petitioner, Kenneth W. Behrend, which had arisen from the district court's assertion of the said Rule herein. (See Petitioners Appendix B1 and B2).

Your petitioner respectfully submits that the district courts superimposition of DR 2-106(a) upon a 28 U.S.C.A. 2678 situation works a direct conflict of a Judge-made State Supreme Court Rule with, and the probable rescission of an act of the national Congress, warranting plenary supervisory review by your Honorable Court.

Petitioners renew their prayer that the writ of certiorari issue so, that this Honorable Court may review the action of the courts below and direct appropriate remedial action.

Respectfully submitted,



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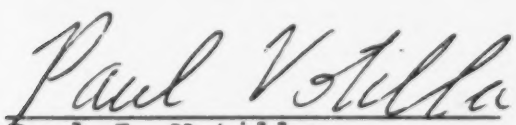

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October 1984

APPENDIX

Samuel C. Stretton
Attorney at Law
305 North High Street
West Chester, PA 19380

September 21, 1984

Kenneth Behrend, Esquire
1320 Grant Building
Pittsburgh, PA 15219

Dear Ken:

I have enclosed a copy of the September 14, 1984 letter of Burkhardt indicating your case was dismissed formally. This was the case involving the matters with Judge Ziegler.

I hope all is well with you and I hope that we are still friends and if you are ever in the area, you will stop by or give me a call.

Very truly yours,
(signed)
Samuel C. Stretton

SCS:dam
enc.

COPY

APPENDIX B1

OFFICE OF DISCIPLINARY COUNSEL
The Disciplinary Board of the
Supreme Court of Pennsylvania
DISTRICT IV OFFICE
3718 Mellon Bank Building
525 William Penn Place
Pittsburgh, Pennsylvania 15219

September 14, 1984

Samuel C. Stretton, Esquire
305 North High Street
West Chester, PA 19380

Re: Kenneth W. Behrend, Esquire
File Reference #C4-84-650

Dear Mr. Stretton:

This is to advise you that a complaint concerning Mr. Behrend which was opened on motion of the Office of Disciplinary Counsel has now been dismissed.

Be assured that I appreciated receiving from you the brief you sent with your letter of May 19, 1983.

We have had no contact with Mr. Behrend. I note that he was a courtesy addressee of your letter, and might be interested to know of this disposition. Best personal regards.

Sincerely,
(signed)
Edward A. Burkardt
Assistant Disciplinary Counsel

EAB/lm

COPY

APPENDIX B2

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of October, 1984 served three copies of the within Petition for Writ of Certiorari by first class mail, postage pre-paid upon each of the following: ROBERT A. ZUNICH, Zimmer and Dice, 584 Allegheny Avenue, Oakmont, PA 15139, PAUL J. BRYSH, Assistant U.S. Attorney, U.S. Attorney's Office, 633 U.S. P.O. and Courthouse, Pittsburgh, PA 15219 and NEIL L. CONWAY, Harrigan, Kluger, Spohrer & Quinn, 700 United Penn Bank Building, Wilkes-Barre, PA 18701. I have also made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by serving three (3) copies of this foregoing Petition for Writ of Certiorari by first class mail, postage pre-paid. I further

certify that all parties required to be served have been served.

BY Charles S Morrow

Charles S. Morrow
1320 Grant Building
Pittsburgh, PA 15219

Paul Votilla

Paul J. Votilla
1326 Grant Building
Pittsburgh, PA 15219